SUPREME COURT, U. S.

SEP 16 1968

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 527

October Term, 1968

BERNARD F. CURRY
and
MARVEL I. CURRY

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes now Bernard F. Curry and Marvel I. Curry Petitioners herein, by and through their undersigned attorneys, and respectfully pray this Honorable Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on the 21st day of June, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is found in Appendix A hereof, and is reported in 396 Fed. 2d ....

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1968, Appendix B. The jurisdiction of this Court is invoked under 28 USC, Section 1254(1).

QUESTIONS PRESENTED

I.

WHETHER OR NOT THE COURT ERRED IN HOLDING THAT A GUARANTEE PAYMENT BY A NON-CORPORATE GUARANTOR OF A CORPORATE OBLIGATION IS TO BE TREATED AS A CONTRIBUTION TO CAPITAL WHEN THIS COURT HAS HELD THAT SUCH A PAYMENT IS A BAD DEBT.

II.

WHETHER OR NOT THE COURT ERRED IN APPLYING AN INCORRECT LEGAL STANDARD AS TO THE DEFINITION OF A DEBT.

III.

WHETHER OR NOT THE COURT ERRED IN FAILING TO APPLY THE COHAN DOCTRINE IN CONNECTION WITH TRAVEL AND ENTERTAINMENT EXPENSES CLAIMED BY THE PETITIONERS ON THEIR INCOME TAX RETURNS.

STATUTES AND REGULATIONS INVOLVED

The statutory provision involved is Section 166(a)(1) of the Internal Revenue Code of 1954, 26 USC, Section 166(a)(1) and is printed in Appendix C. The regulations involved are United States Treasury Regulations, Section 1-166-8(b) and is printed in Appendix D.

STATEMENT OF THE CASE

Petitioners filed their federal income tax returns for the years concerned with the District Director of Internal Revenue, Jacksonville, Florida.

The deficiencies in income tax result from a determination by the Commissioner of Internal Revenue that a business bad debt loss claimed in the year 1961 and carried back to the years 1958, 1959 and 1960 was a contribution to capital or, if it was a bad debt, it was a nonbusiness bad debt and allowable as a short term capital loss only. The Commissioner also determined that travel and entertainment expenses claimed by the Petitioners on their income tax returns for the years 1959, 1960 and 1961 were not allowable for lack of substantiation.

This case was tried in the United States District Court for the Southern District of Florida, without a jury, and the Court found against the Petitioners on these issues except, because of a concession by the government, the Court allowed the travel and entertainment expenses for the year 1961 in full. The Court of Appeals affirmed.

The Petitioner, Bernard F. Curry, has been in the automobile business for fifty years and acquired 50% of the outstanding stock of Olin's, Inc. and Olin's Airport U-Drive-It, Inc. from Olin W. Harbett under the terms of a purchase contract dated July 27, 1956. (R. 27) Olin's, Inc. had been engaged in the automobile rental activity since about 1941 and was originally capitalized at that time for $150,000.00 and Olin's Airport U-Drive-It, Inc. was also in the automobile rental business since about 1950 and had originally been capitalized at $200,000.00.

These corporations were in financial difficulty in 1956 and both had deficits in the surplus account but there still was a substantial capital equity in each corporation in excess of $100,000.00.

Under the terms of the contract of July 27, 1956, Curry personally advanced $100,000.00 on two occasions to Olin's, Inc. receiving in exchange on each occasion a demand note for $100,000.00. The first note was unsecured and non-interest bearing. The second note carried interest at 6% and was secured by an assignment of the accounts receivable of Olin's, Inc. pursuant to a rider attached to the contract of July 27, 1956. The Court below found, on Page 3 of the opinion (Appendix A), that the rider was

later attached to the note yet it is clear from the rider (R. 36) that, in the event the second advance was made, Curry was to receive an assignment of the receivables and that the rider could have been executed only prior to the second advance.

In 1958, Curry advanced an additional $75,000.00 to Olin's, Inc. and, in 1960, he received repayment of $125,000.00. In connection with this repayment, the Court below, on Page 8 of its opinion (Appendix A), found that this repayment was with monies advanced by Curry himself when the record is clear that the last direct advances or loans to the corporations were in 1959, which certainly could not give rise, a year later, to a finding that he received payment from this source and he certainly could not have received repayment as a result of a bank loan directly to the corporations in 1961 since the repayment was one year prior.

In 1961, Olin's, Inc. borrowed an additional $200,000.00 from a bank on Curry's guarantee and, later on in the same year, Olin's, Inc. defaulted on this note and Curry was obligated under the guarantee to repay the $200,000.00 plus interest of $2,527.28.

In 1958, Curry opened and guaranteed a $250,000.00 unsecured line of credit for Olin's Airport U-Drive-It, Inc., of which $150,000.00 was repaid by the corporation in 1959 but, because the corporation could not pay the rest, Curry advanced this corporation $100,000.00 to pay off this account. Also during 1958, Curry made other advances to Olin's Airport U-Drive-It, Inc., of which $25,000.00 was never repaid.

Thus by 1961, after the payment of the bank guarantee of $202,527.78, there was still due and owing to Curry the amount of $150,000.00 from Olin's, Inc. and $125,000.00 from Olin's Airport U-Drive-It, Inc., which amounts aggregated the bad debt claimed by Curry in 1961 of $477,527.78 and which the Court below found were contributions to capital, thereby making moot as to whether or not these alleged bad debts were deductible as business or as nonbusiness bad debts.

Curry also claimed, on his 1959, 1960 and 1961 income tax returns, travel and entertainment expenses in varying amounts, which expenses were disallowed in total by the Commissioner of Internal Revenue. Nevertheless, at the trial of this case, the government conceded the expenses for the year 1961 after Curry introduced into evidence a summary of his diary for that year. No further allowance, though, was made by either the Trial Court or the Court of Appeals for these expenses for the years 1959 and 1960 although the evidence clearly discloses that the Revenue Agent examining the return told Mr. Curry he didn't want to see the summaries and Mr. Curry testified that he was unable to locate said summaries for the trial but that the expenses as claimed were of the same type and for similar purposes as expenses reflected in his 1961 diary and summary.

REASONS FOR GRANTING THE WRIT

The reasons relied on for the issuance of the writ are as follows:

First: Conflict of the decision below with the applicable decisions of this Court and with other Courts of Appeal.

Second: The public importance of the question of Federal law decided by the Court below.

1. Conflict—We submit that the decision below is in conflict with the applicable decision of this Court in **Putnam v. Commissioner of Internal Revenue**, 352 U.S. 82 (1956) in connection with the guarantee payment and in conflict with the decisions of the Third and Ninth Circuits in the cases of **Diamond Bros. Co. v. Commissioner**, 322 Fed.2d 725 (CA-3, 1963) and **Wilshire & Western Sandwiches, Inc. v. Commissioner**, 175 Fed.2d 718 (CA-9, 1949) in connection with the legal standard to be applied in defining a debt.

In **Putnam v. Commissioner**, supra, this Court held that, in connection with a payment by a taxpayer in discharge of his obligation as guarantor of corporate notes, said guarantee payment is to be treated as a debt, and stated:

> "Under the doctrine of subrogation, payment by the guarantor, as we have seen, is treated not as creating a new debt and extinguishing the original debt, but as preserving the original debt and merely substituting the guarantor for the creditor."

and Treasury Regulation Section 1.166-8(b) also holds that a loss sustained by a corporate taxpayer upon discharge of his obligation as the guarantor of a corporate obligation is to be treated as a nonbusiness bad debt or a business bad debt if it so qualifies.

The Court below, in its opinion (Appendix A) on Page 6, states:

> ". . . if an advance creates unconditional obligations to pay a sum certain on a set date, it is normally considered a debt."

By this statement, the Court below has applied an incorrect legal standard of requiring all loans or advances to have a set due date. In **Diamond Bros. Co. v. Commissioner**, supra, the Court stated:

> "The Treasury Regulations concerning bad debts defines a bona fide debt as 'a debt which arises from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money'."

Nowhere does the Court set a requirement that the obligation must be on a set date nor did the Court, in **Wilshire & Western Sandwiches, Inc. v. Commissioner**, supra, find that such a requirement was necessary. There the Court found that the elements of a debtor-creditor relationship were as follows:

> ". . . meeting of the minds as to the intent of the nature of the advance; transfer of the consideration and a promise to pay evidenced by negotiable promissory notes presenting an unconditional and legally enforceable obligation for the payment of money. It is apparent that, had the dealings been with an independent third party, no question as to the propriety of the interest deduction could have been raised."

Although the **Wilshire & Western Sandwiches, Inc.** case concerned itself with an interest deduction, the elements of a debtor-creditor relationship are the same and there is no question that, in the instant case, these obligations would have been proper with an independent third party.

In connection with the issue as to travel and entertainment expenses, the Petitioner submits that the Court below is in conflict not only with the decisions of all other Courts of Appeal but with its own decisions in that, under the facts of this case, the Court should have applied the Cohan Doctrine as enunciated in the case of **George M. Cohan v. Commissioner**, 39 Fed.2d 540 (CA-2, 1930).

2. Public Importance—The Court below, in adding the requisite requiring a set due date for an advance or loan to qualify as a debt, is, in effect, nullifying not only loans and advances not evidenced by any instrument but also holding for naught demand instruments as herein. Of greater significance is the fact that, by requiring a set due date, there would be no instance of any type where a stockholder could lend money to a corporation in which he has an interest evidenced by a demand note. To permit this requisite to stand would impair the obligations of all contracts of a like and similar nature, even between third parties.

CONCLUSION

WHEREFORE it is respectfully submitted that this petition should be granted.

Respectfully submitted,

Sidney A. Soltz
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CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the above and foregoing petition was mailed to the Solicitor General, United States Department of Justice, Washington, D.C., this __ day of September, 1968.

Sidney A. Soltz

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 25,336

BERNARD F. CURRY and MARVEL I. CURRY,
Appellants,

vs.

UNITED STATES OF AMERICA
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(June 21, 1968.)

Before BROWN, Chief Judge, DYER, Circuit Judge, and GARZA, District Judge.

GARZA, District Judge: Appellant in this district court was seeking from the United States a refund of certain income taxes paid for the year 1958-1961 in the amount of $142,958.60.

Appellant was required to pay this amount as a deficiency assessment because the Internal Revenue Service disallowed certain business losses claimed by Appellant.

From an adverse ruling, the Appellant brought this appeal.

The essential background is as follows:

Appellant is a well-known and lifetime figure in virtually all aspects of the automobile business excluding production. He operates in New York and Florida. Most of these operations are conducted through controlled corporations.

In 1956, Appellant entered into a stock purchase contract with one Olin W. Harbett, hereinafter known as "Harbett". Through this contract, Appellant acquired one-half of the stock in seven Florida corporations. Appellant's transactions with two of these corporations, Olin's, Inc. (hereinafter designated as "Olin's") and Olin's Airport U-Drive-It, Inc. (hereinafter designated as "Airport"), are the subject of this lawsuit.

Both of these corporations were involved in car rentals and have been in business since 1941.

Appellant had previously been an investor in these two corporations, but had sold out prior to the stock purchase agreement with Harbett.

Before the stock purchase contract, another company was about to take control of the corporations from Harbett, in furtherance of which a loan of $150,000.00 had been made to Harbett. On the date of the stock purchase contract in question, the Appellant also acquired this loan. Appellant also purchased two pledge agreements previously made between Harbett and two third-party lenders.

The 1956 stock purchase contract recites only a nominal consideration of Ten Dollars, but the evidence revealed that the Appellant acquired the stock in the corporation for $50,000.00. Appellant also promised to personally advance to the corporations the sum of $200,000.00, and promised to secure other lines of credit. These considerations were the basis for the Appellant's right to participate in the management of the corporations. In 1960 the Appellant acquired the remaining fifty per cent of the capital stock in Airport and Olin's for no consideration.

In 1956 Appellant personally advanced $100,000.00 on two occasions to Olin's, receiving in exchange on each occasion a demand note from Olin's for $100,000.00. The first note was unsecured and non-interest bearing. The original stock purchase contract provided for six per

cent per annum interest, but this provision was stricken from the agreement at the time it was executed. The second $100,000.00 note did carry six per cent per annum interest, but was unsecured. A rider was later attached to this note, whereby Olin's assigned its Accounts Receivable as collateral for the advance.

In 1958, Appellant advanced an additional $75,000.00, giving a total of $275,000.00 advanced.

Olin's repaid $125,000.00 in 1960, leaving a balance of $150,000.00.

In 1961, Olin's borrowed an additional $200,000.00 from a bank on Appellant's guaranty. Later in 1961 Olin's defaulted on this note and Appellant repaid the principal and interest for a total of $202,527.78.

In 1958 Appellant opened and guaranteed a $250,000.00 unsecured line of credit for Airport from a local bank. In 1959 Airport repaid the bank $150,000.00, but because of financial difficulties could not pay the rest. Appellant advanced Airport $100,000.00 to pay off this note.

Also during 1958 Appellant made other advances to Airport, $25,000.00 of which was never repaid. Appellant's net total uncollectible advances to Airport aggregate $125,000.00.

It is undisputed that these companies, because of their financial problems, were only able to borrow money from lending institutions, based upon Appellant's guaranty.

During the years 1956 through 1961, Appellant, as an employee of these two corporations and as an insurance broker, received approximately $90,000.00 in salaries and insurance commissions.

Appellant's purpose in making the advancements and guaranty payments to and on behalf of the corporations was to provide operating capital which was necessary to continue their operations.

Appellant claimed that this was extremely necessary because his automobile financial empire consisted of these two corporations plus many others. He reasoned that the failure of any one would adversely affect all of his corporations because he operated on a large personal line of credit. Appellant contended that once he got into the situation, he had to continue through fear of his empire collapsing.

The amount of bad debts substained by the taxpayer in 1961 is undisputed. The main item in dispute is whether these are business or non-business bad debts, or short term capital loss.

Appellant contends that the advances and guaranty payments in question were business bad debts and deductible as such in the year of their worthlessness.

The district court, based upon the above facts, concluded that the advances and guaranty payments made by the Appellant to and on behalf of the corporations were contributions to capital and not indebtedness.

As an alternative holding, the district court decided that even if these advances and guaranty payments were indebtedness, they were deductible only as non-business bad debts because they were not closely enough connected to Appellant's business.

Another minor issue in this case concerns alleged deductions for travel and entertainment expenses of Appellant for the years 1959 through 1961. The Government disallowed most of these deductions for Appellant's inability to substantiate them.

The district court found that the 1961 deductions were substantiated, and allowed them, but did not allow the deductions for 1959 and 1960 because they were not substantiated.

Appellant is attempting to deduct his losses as an ordinary expense based upon the assertion that his losses are business bad debts connected with his business. Sec. 162, Internal Revenue Code of 1954.

Appellant has the burden of proving that he is entitled to these deductions as a basis for claiming the refunds. U.S. v. Byck, 325 F.2d 551 (5 Cir., 1963).

This Court agrees with the district court. The Appellant has not met his burden.

If repayment of an advance is contingent upon the success of the business, the advancement is usually considered a contribution to capital; conversely if an advance creates unconditional obligations to pay a sum certain on

a set date, it is normally considered a debt. **U.S. v. Henderson**, 375 F.2d 36 (5 Cir., 1967); **Tomlinson v. 1661 Corp.**, 377 F.2d 291 (5 Cir., 1967).

Often, however, numerous factors enter to make the picture cloudy. The same transaction will give the appearance of both a capital contribution and a loan.

This Court on numerous occasions has had the opportunity to set down distinguishing criteria as a guideline for making such distinctions. **Tomlinson v. 1661 Corp., supra; U.S. v. Henderson, supra; Montclair Inc. v. Commissoner**, 318 F.2d 38 (5 Cir., 1963).

Each case involving the capital versus debt distinction "must be judged on its own unique fact situation." **Tomlinson v. 1661 Corp., supra.**

Looking at the entire record, it is obvious that the pendulum swings in this case in the direction of a capital contribution.

The fact that the advancements were evidenced by debt instruments and the Appellant's testimony that the parties intended to create an indebtedness point to a conclusion of a debt. Juxtaposed, however, are the following facts:

You cannot separate the advancements from the stock transfers. Appellant was actually buying the corporation.

At first he received fifty per cent of the stock, and later one hundred per cent. His managerial rights resulted from his making the advancements.

The corporations were in desperate financial straits. It is undisputed that no outside lending institution would loan them money without Appellant's guaranty. This factor is indicative of a capital contribution, because a true lender is concerned with interest. Appellant showed very little concern over the interest.

This being a highly risky business, a true lender would demand a high rate of interest. Only one of the notes in question made any provision for interest whatsoever. The only note bearing interest provided for a six per cent rate which is a rather low interest rate considering the risk involved. Only a portion of the interest on this note was ever paid. It is clear that the Appellant was not seriously expecting any substantial interest income, but was interested in the future earnings of the corporation or the increased market value of his interest.

Another interesting factor which points towards a contribution to capital conclusion, is the fact that only one of the notes had a definite maturity date. As mentioned earlier, one of the normal requisites of a true debt situation is that a sum certain will be paid on a particular day. The only note that had a definite maturity date was paid approximately two years after said date with moneys advanced by the Appellant himself.

It is also important to note that these corporations were extremely under-capitalized to the point that in 1958 the corporate debts exceeded paid in capital. By 1961, the year of the asserted bad debt deduction, the deficits were four or five times the paid in capital. In fact by that time the Appellant's advances constituted virtually all the working capital.

While thin capitalization will not alone justify designated indebtedness as capital (**Rowan v. U.S.**, 219 F.2d 51, 5 Cir., 1955), it is very strong evidence of such a finding, especially when many other factors point in that direction.

After reviewing the entire record, this Court agrees with the district court in concluding that the Appellant has failed to carry his burden of proving that the advances were truly loans rather than contributions to capital.

Therefore, Appellant, having made contributions to capital, should be and will be allowed only a capital loss.

This Court having decided that the advances made by Appellant were contributions to capital, it is unnecessary for this Court to pass on the question of business or non-business bad debts.

The final issue in this case concerns the deductibility of certain travel and entertainment expenses for the taxable years 1959 and 1960.

Section 6001, Internal Revenue Code of 1954, requires that these deductions be substantiated by records. The Appellant has not substantiated these alleged deductions, and they will not be allowed. **Williams v. U.S.**, 245 F.2d 559 (5 Cir., 1957).

The decision of the district court is, therefore,

AFFIRMED.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1967

No. 25,336

D. C. Docket No. 66-338-CF-Civil Action

BERNARD F. CURRY and MARVEL I. CURRY,

Appellants,

vs.

UNITED STATES OF AMERICA

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, DYER, Circuit Judge, and GARZA, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

June 21, 1968

Issued as Mandate: Jul 15 1968

APPENDIX C

STATUTES

Sec. 166. BAD DEBTS

(a) General Rule.—

(1) WHOLLY WORTHLESS DEBTS.—There shall be allowed as a deduction any debt which becomes worthless within the taxable year.

APPENDIX D

REGULATIONS

Sec. 1.166-8(b)

(b) Corporate obligations. The loss sustained during the taxable year by a taxpayer other than a corporation in discharge of all of his obligation as a guarantor of an obligation issued by a corporation shall be treated, in accordance with Section 166(d) and the regulations thereunder, as a loss sustained on the worthlessness of a nonbusiness debt if the debt created in the quarantor's favor as a result of the payment does not come within the exceptions prescribed by Section 166(d)(2) (A) or (B). See paragraph (a)(2) of §1.166-5.